Supreme Court, U.S.
FILED
NOV 12 1996
OFFICE OF THE CLERK

(1)

No. 96 751

In The

Supreme Court of the United States

October Term, 1997

JAMES P. SCIARRINO,

Petitioner,

v.

CITY OF KEY WEST,

Respondent.

Petition for Writ of Certiorari to the 11th Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

MICHAEL R. BARNES
Counsel of Record
RICHARD L. WILSON
MICHAEL R. BARNES, P.A.
Attorneys for Petitioner
513 Whitehead Street
Key West, Florida 33040
(305) 296-5297

51pp

QUESTION PRESENTED

Whether truthful, non-coercive commercial speech, concerning lawful activities, should be entitled to full First Amendment protection.

TABLE OF CONTENTS

Page

Question Presented..... i

Table of Contents..... ii

Table of Citations.....iii

Opinions Below.....1

Statement of Jurisdiction.....2

Constitutional Provisions Involved 2

Statement of the Case.....2

Reasons for Granting the Writ 4

A. The 11th Circuit Has Entered a Decision in Conflict with Another United States Court of Appeals.....4

B. The 11th Circuit Has Decided an Important Federal Question in a Way That Conflicts with Relevant Decisions of this Court 6

C. The 11th Circuit Has Decided an Important Question of Federal Law That Has Not Been, but Should Be, Settled by this Court 14

Conclusion 18

TABLE OF CITATIONS

Cases Cited:

44 Liquormart v. Rhode Island,
116 S.Ct. 1495 (1996).....8-13

Austin v. Michigan Chamber of Commerce,
494 U.S. 652 (1990).....16

Bates v. State Bar of Arizona,
433 U.S. 350 (1977).....15

Board of Trustees of State University of New York v. Fox
492 U.S. 469 (1989).....4,14,16

Central Hudson Gas & Electric Corp. v. Public Service Comm'n
447 U.S. 557 (1980).....4,10,13-17

City of Cincinnati v. Discovery Network,
507 U.S. 410 (1993).....7,9,14,17

Coates v. City of Cincinnati,
402 U.S. 611 (1971).....8

Edenfield v. Fane,
507 U.S. 761 (1993).....6,12,13

Florida Bar v. Went-For-It, Inc.,
115 S.Ct. 2371 (1995).....6,12,13

Hays County Guardian v. Supple,
969 F.2d 111 (5th Cir. 1992).....5

Lovell v. Griffin,
303 U.S. 444 (1938).....2

Ohralik v. Ohio State Bar Assn.,
436 U.S. 447 (1978).....15-17

Pittsburgh Press Co.
v. Human Relations Comm'n,
413 U.S. 376 (1973).....15

Posadas de Puerto Rico Associates
v. Tourism Co. Of P.R.,
478 U.S. 328 (1986).....11

Rubin v. Coors Brewing Co.,
115 S.Ct 1585 (1995).....13

Schneider v. State,
308 U.S. 147 (1939).....5

Stromberg v. California,
283 U.S. 359 (1931).....2

Virginia Pharmacy Bd.v. Virginia
Citizens Consumer Council, Inc.,
425 U.S. 748 (1976).....11,14,15

Federal Statute Cited:

28 U.S.C. 1254 (1).....2

United States Constitution Cited:

First Amendment
to the United States Constitution .....passim

Fourteenth Amendment
to the United States Constitution 2

APPENDIX

Appendix A -- Opinion of the United States District Court
for the Southern District of Florida,
Decided October 27, 1994. .....A-1

Appendix B -- Opinion of the 11th Circuit Court of Appeals
Decided May 16, 1996. .....B-1

Appendix C -- Order of the 11th Circuit Court of Appeals
Denying Rehearing, filed August 14, 1996 .....C-1

No.

In The

Supreme Court of the United States

October Term, 1997

JAMES P. SCIARRINO,

Petitioner,

v.

CITY OF KEY WEST,

Respondent.

Petition for Writ of Certiorari to the 11th Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

James P. Sciarrino respectfully petitions for a writ of certiorari to review the judgment of the 11th Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida (Appendix A, *infra*, pp A 1- 12) is reported at 867 F.Supp. 1017. The opinion of the 11th Circuit Court of Appeals is reported at 83 F.3d 364. (Appendix B, *infra*, pp B 1- 13) Sciarrino's Petition for Rehearing was

denied on August 14, 1996 and is unreported. (Appendix C, *infra*, pp C 1 and 2)

STATEMENT OF JURISDICTION

The District Court Opinion containing its Findings of Fact and Conclusions of Law was decided on October 27, 1994. The 11th Circuit Court of Appeals Opinion was decided on May 16, 1996. The 11th Circuit Court of Appeals denied Sciarrino's Petition for Rehearing on August 14, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment provides, in part: "Congress shall make no law . . .abridging the freedom of speech, or of the press . . . ." The Due Process Clause of the Fourteenth Amendment has been construed to make this prohibition applicable to state action. See, e. g., *Stromberg v. California,* 283 U.S. 359 (1931); *Lovell v. Griffin,* 303 U.S. 444 (1938).

STATEMENT OF THE CASE

Petitioner Jim Sciarrino's restaurant, Clancy's Gourmet Pizza, is a family restaurant in Key West, Florida, one block from Duval Street, the principal tourist thoroughfare. The overwhelming majority of tourists can be found in a few areas: along Duval, Whitehead and Front Streets, in Mallory Square and on the beaches. Duval Street is considered the main tourist thoroughfare.

To inform those potential customers about Clancy's, the business employs people as "off-premises canvassers" (OPC) to offer handbills to tourists willing to accept them. The materials consist of small handbills which include a map

showing the restaurant's location on a copy of the restaurant's menu. This is the only effective advertising medium available to the business to reach the tourists who vacation out of doors and away from the reach of television, radio, and local newspapers.

Reacting to the competition from Clancy's and other businesses, the Duval Street Merchant Group, who were faced with increased competition from businesses located "off-street" and therefore paying lower rents, began complaining to the City of Key West City Commissioners in order to stop such competition. Although a greater number of small businesses opposed the anti-competitive ordinance, the City Commission pacified the Duval Street Merchant Group by enacting Chapter 94 of the Key West Code of Ordinances on March 17, 1992. The effect of the Chapter 94 was to eliminate OPC activity, through the Ordinance's vigorous 24 hour a day enforcement, from all areas where any significant numbers of tourists could be found. The ordinance effectively separated the speakers from their only intended audience.

Conversely, the Duval street merchants were allowed to continue to exercise their First Amendment rights by soliciting tourists from their doorways immediately adjacent to the public sidewalk. Merchants, with storefronts on Duval Street, beckon to tourists, pass out written advertising materials and compete for business. Salespersons in kiosks, built on private property adjacent to the sidewalks, gather crowds to which they show videotapes and makes sales presentations. The sidewalks get very congested through this activity with the Duval Street merchants and the tourists causing most of the congestion. By contrast, the mission of Sciarrino's OPC is to suggest that tourists leave the crowded street to visit his restaurant, located on a side street, thereby lessening congestion on the busiest sidewalks.

As developed more fully herein, the Respondent City of Key West, alleged and both the District Court and the 11th

Circuit Court of Appeals ultimately held, that legitimate interests in controlling litter, congestion, and over-zealous solicitation, could properly result in the abridgment of Sciarrino's First Amendment rights, through the application of the standards set forth in *Central Hudson* and *Fox*, *infra*.

REASONS FOR GRANTING THE WRIT

A. The 11th Circuit Has Entered a Decision in Conflict with Another United States Court of Appeals

In the instant case, the 11th Circuit Court of Appeals held that it was proper to restrain, Petitioner Sciarrino's truthful, non-coercive, First Amendment commercial speech, which proposed a lawful transaction in order to control litter, congestion, and over-zealous solicitation.

In direct conflict, the 5th Circuit Court of Appeals in *Hays County Guardian v. Supple* 969 F.2d 111,119 (5th Cir. 1992) refused to allow Southwest Texas State University to abridge its students rights under the First Amendment, with the University claiming its right to do so, to cure the identical complaints of litter, congestion, and over-zealous solicitation.

In Sciarrino's case both the District Court and the Appellate Court determined that a time, place and manner restriction was consistent with the standards of *Central Hudson Gas & Electric Corp. v. Public Service Comm'n* 447 U.S. 557 (1980) and *Board of Trustees of State University of New York v. Fox* 492 U.S. 469 (1989). In Sciarrino's case, this resulted in a "reasonable" restriction being one which, as to time, curtailed Sciarrino's First Amendment rights twenty-four (24) hours a day, every day of the year. As to place, the opinions below resulted in Sciarrino's employees being prohibited from operating in any location where significant numbers of tourists were likely to be because the City of Key West prohibited Sciarrino's commercial speech in all tourist areas. As to

manner, the restrictions placed on Sciarrino required his employees to stand on a side street, behind a painted line twenty-five (25) feet away from the primary tourist sidewalk thoroughfare. Although Key West subsequently reduced this distance to ten (10) feet, that distance remains well beyond any place from which Sciarrino's employees could effectively speak to their potential customers or offer them advertising.

In *Hays County Guardian*, the Fifth Circuit refused to dilute the First Amendment and stated,

> If the University wishes to prevent litter, it should prohibit littering. *Schneider v. State*, 308 U.S. 147, 162, 84 L. Ed. 155, 60 S. Ct. 146 (1939). If it wishes to prevent overcrowding, then the University should regulate the time and place of students who hand out papers on the campus to prevent congestion. Cf. Lee, 60 U.S.L.W. at (O'Connor, J., concurring). If the University wants to prevent obstreperous distribution of the papers, then it should forbid students from pressing their publications on unwilling recipients. *Martin v. Struther*, 319 U.S. 141, 148, 63 S. Ct. 862, 87 L. Ed. 1313 (1943).

The approach stated in the holding of the 11th Circuit was rejected by the Fifth Circuit in *Hays County Guardian.* It is significant that the interests asserted by Respondent herein and affirmed by the 11th Circuit were identical to the interests which did not result in a ban on commercial speech in the 5th Circuit. Such inconsistent adjudications illustrate clearly what appears to be the divergent thinking of the 11th Circuit Court from that of other Circuits and Supreme Court as developed

more fully herein.[1] Under the 11th Circuit's opinion, commercial speech is in serious trouble in the states of Florida, Alabama and Georgia and the 11th Circuit's opinion displays a conflict of holdings in the Circuits.[2]

B. The 11th Circuit Has Decided an Important Federal Question in a Way That Conflicts with Relevant Decisions of this Court

A party seeking to impose a restriction on commercial speech must demonstrate that the harms which the ban addresses are both real and that such harms will be alleviated to a material degree by the restriction. (Emphasis supplied) *Edenfield v. Fane*, 507 U.S. 761 (1993). The 11th Circuit found that harms asserted by the City which justified the restriction on commercial speech were litter, over-zealous solicitors, and sidewalk congestion. The 11th Circuit's analysis which followed should then have critically examined the asserted interests to determine if the OPC ban advanced them "to a material degree." An evidentiary record must demonstrate that at least one of those interests has been advanced to a material degree. *Edenfield, supra*; *Florida Bar v. Went-For-It, Inc.*, 115 S.Ct. 2371, 2376, n. 1 (1995).

---

[1] *Hays* provided, "Assuming that the University faced some marginal increase of litter, congestion, and unwelcome advances by over-zealous, newspaper-wielding students, there is no substantial evidence that the anti-solicitation regulations were reasonably well-fitted to preventing these ills."

[2] For instance, it appears that in Texas, Louisiana and Mississippi the ordinance upheld by the 11th Circuit would have been struck down. *Hays County Guardian, supra*

The factual findings of the trial court with regard to congestion, described with more particularity herein, demonstrate that the City ordinance "does not significantly reduce this problem.", and that the challenged ordinance provided only, " ... a tangible, if modest, reduction in sidewalk congestion." (Emphasis supplied) Specifically, the 11th Circuit recognized that the findings of the trial court, did not go far enough to justify such a restriction on First Amendment speech. There is no finding, in the instant opinion, that a material advancement is present in the area of congestion. It is not reasonable, therefore, to conclude that removing a few canvassers from those sidewalks is a *material* advancement. There is also no argument that, in comparison, there were only a handful of OPC. [3]

The unrefuted cause of sidewalk congestion in the tourist driven economy of Key West, Florida, as recognized by the trial court, is the multiple thousands of tourists, who, invited by Respondent City of Key West and its representatives, stroll along those sidewalks every day.

The evidence was also unrefuted that Sciarrino's OPC directed tourists off of the crowded and congested Duval Street, to Sciarrino's side street restaurant. It therefore follows that the actual effect of his OPC and their exercise of commercial speech was to lessen congestion overall, by taking tourists off of the congested main tourist thoroughfare. The proof that Sciarrino caused this beneficial effect and had a positive result in reducing

---

[3] As City witness (and former City Commissioner) Virginia Panico testified, there were at most 30 canvassers in Mallory Square, and thousands of tourists. This is strikingly similar to the 62 commercial newsstands on the sidewalks of Cincinnati and 1500 - 2000 non-commercial news racks noted in *Discovery Network*, *infra*, which did not result in an elimination of First Amendment rights.

congestion, is found in the acknowledged complaints by Sciarrino's competitors, who arguably would not have made such complaints originally to the City Commission except for Sciarrino's success in taking tourists, for whom they were competing, off of the congested Duval street.

The factual findings of the trial court, with regard to harassment of pedestrians indicated that there was a decrease because of a decrease in complaints. Such a result could be expected for two (2) reasons totally unrelated to the City's legitimate goals. The first is that the City was successful in intimidating the vast majority of OPC to surrender their First Amendment rights without pursuing their remedies at law. The second reason is even more transparent. It appears axiomatic that if you curtail the speech of OPC, the complaints about their speech will diminish. Sciarrino asserts that the First Amendment is about preserving speech not eliminating it. In that Sciarrino has continued unabated to exercise his First Amendment rights, it is illogical to assume that any claimed decrease in harassment, with regard to Sciarrino, is a result in any way from the City's ordinance. Sciarrino continues to maintain that no harassment occurs, since it seems clear that one does not harass people into eating in a restaurant.

Consistent with prior holdings of this Court, Sciarrino has consistently argued that the City may not prohibit commercial speech on its sidewalks because some individuals are "annoyed." *Coates v. City of Cincinnati*, 402 U.S. 611 (1971). The 11th Circuit, contrary to the holding of *Coates*, took the position that restricting Sciarrino's First Amendment rights was proper to prevent the "harassing" of pedestrians. But the Key West City ordinance goes much further. It also prevents *non-harassing* commercial speech as well. Instead of acting to prohibit the harassment, the City simply banned the speech, implementing the ill-favored " throwing out the baby with the bath-water" solution. Unlike the United States Supreme Court's direction, as enunciated in *44 Liquormart* — which moved ever

closer to granting commercial speech the same protections as noncommercial speech — the decision by the 11th Circuit sends it in a divergent direction already questioned by the Supreme Court.

After the 11th Circuit had decided the instant case and presumably after the opinion had been submitted for publication, (but before the opinion was actually published), this Court rendered its decision on the key commercial speech case of that term. That case, *44 Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1495 (1996), gave substantial direction and impetus to the previous decisions of this Court in the area of commercial speech and supported a finding of the 11th Circuit for Sciarrino, not the City of Key West.

The New York Times, in recognizing the import of the *44 Liquormart* decision quoted Justice Stevens, who delivered the principal opinion of the Court, "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." Commercial Free Speech Gets Freer, Editorial Page, *The New York Times*, National Edition, May 15, 1996.

Just a few years ago the Supreme Court signaled its concern that commercial speech was not being given the protection to which it is entitled under the Constitution. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). Given the Supreme Court's later language in *44 Liquormart v. Rhode Island*, it seems apparent that the Court's evolution toward equality between commercial and noncommercial speech continues.

Contrary to the direction of the Supreme Court in *44 Liquormart*, the 11th Circuit said ". . . the constitution in reality grants 'less protection to commercial speech than to other constitutionally safeguarded forms of expression.' " But how much less? Sciarrino submits that the direction of the jurisprudence by the 11th Circuit in this case is contrary to the

direction and language of the Supreme Court in significant relevant decisions as demonstrated by the following examples:

a. Sciarrino has asserted herein that the City's actions constitute a *de facto* total ban on his First Amendment commercial speech. The 11th Circuit disagreed. The Supreme Court in *44 Liquormart* stated, "...in recent years this Court has not approved a blanket ban on commercial speech unless the speech itself was flawed in some way, either because it was deceptive or related to unlawful activity." *44 Liquormart, citing with approval Central Hudson* at fn. 10. The 11th Circuit noted that the City of Key West has conceded that Sciarrino's speech is neither deceptive nor unlawful.

b. The Court in *44 Liquormart* also revisited its language in *Central Hudson* which provided that, "...although the special nature of commercial speech may require less than strict review of its regulation, special concerns arise from 'regulations that entirely suppress commercial speech in order to pursue a non-speech related policy.' *44 Liquormart, citing with approval, Hudson* at 566, n. 9. Such a result is squarely contrary to the direction of the Supreme Court as enunciated in *44 Liquormart*.

c. The Supreme Court continued in *44 Liquormart, quoting with approval Central Hudson*, that "In those circumstances, 'a ban on speech could screen from the public the underlying governments policy.'" In the present case, that idea is directly on point, given the 11th Circuit's comments, in footnote 3 of its own opinion, acknowledging that some portion of the ordinance stemmed from the City's bowing to anti-competitive pressures by some of its constituents. *Sciarrino* 83 F.3d at 368 n3

d. The Supreme Court continued in *44 Liquormart* to highlight the "special care" standard of review, not apparent in the instant case, when lawful advertising that is not deceptive is banned, noting that, "speech prohibitions of this type rarely survive constitutional review."

e. The 11th Circuit has accorded deference to the evidence and ordinance of the Respondent City of Key West. The Supreme Court in *44 Liquormart*, discussing the deference given government in *Posadas de Puerto Rico Associates v. Tourism Co. Of P.R.*, 478 U.S. 328 (1986), announced that it was "...now persuaded that *Posadas* erroneously performed the First Amendment analysis." and also provided that *Posadas* clearly erred in concluding that it was "up to the legislature" to choose suppression over a less speech-restrictive policy. It is clear from *44 Liquormart* and the recent holdings of the Supreme Court that deference takes a second seat to the First Amendment's constitutional magnitude.

f. The Supreme Court in *44 Liquormart* additionally provided clear guidance which appears dissimilar to the present holding of the 11th Circuit in the instant case. The Supreme Court stated, "As we explained in *Virginia Pharmacy Bd.*, '[i]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.'" *44 Liquormart*, *citing* 425 U.S. at 770. The Supreme Court in 44 *Liquormart* continued, "...we think it quite clear that banning speech may sometimes prove far more intrusive than banning conduct."

The ban struck down in *44 Liquormart* and the ban upheld by the 11th Circuit are remarkably similar. In both cases the bans involved commercial speech. In both cases the speech was lawful and not misleading. In both cases the ban was not complete: in *44 Liquormart* the ban did not apply to point of sale advertising; in this case the ban does not apply to areas where there are no tourists.

However, the analysis of the Rhode Island ban used by the Supreme Court, and the analysis used by this Court are remarkably dissimilar. In *44 Liquormart*, the justices repeatedly referred to the government's "heavy" burden, and indicated that a total ban would never survive scrutiny if there were less

extensive measures available to the government. In this case the 11th Circuit has allowed the OPC ban to stand on a near total time, place and manner restriction and on a bare minimum of evidence.[4]

Nor does the genesis of the evidence, adduced at trial level, lend support. The trial judge wrote, "Plaintiff (Petitioner herein) are correct that congestion continues to be a problem for Key West and that the Ordinance does not significantly reduce this problem." The trial court additionally acknowledged that the challenged ordinance provided only, " ... a tangible, if modest, reduction in sidewalk congestion. [emphasis added]. *44 Liquormart* instead requires the City to show "...not merely that its regulation will advance its interest, but also that it will do so "to a material degree," *citing Edenfield v. Fane*, 507 U.S. at 767. Finally, the 11th Circuit's opinion stated that,

> Nonetheless, the statute still survives constitutional scrutiny because the Supreme Court has indicated that direct advancement of even one substantial interest is sufficient to preserve a statute.

Sciarrino 83 F.3d at 369. citing *Florida Bar v. Went For It, Inc.*, 115 S.Ct. 2371, 2376 fn 1. (1995). The 11th Circuit's opinion, regrettably, has misstated that footnote and appears to therefore divert from the actual language of the case and the guidance of

---

[4] It is especially discouraging that the *only* witnesses called by the City to establish the need for this ban on commercial speech were city employees, and neither the trial court nor the 11th Circuit were disturbed by the paucity of evidence, which did not include a single complaint reduced to writing by anyone, or the complete lack of such objectivity. Each witness testifying on behalf of the ban was completely biased in favor of the City's position, and the City has never suggested that those witnesses were anything less than friendly.

its holding. The footnote, quoted in error, says merely that, "...a single substantial interest is sufficient to satisfy *Central Hudson's* first prong." There is no language, in the cited footnote, that supports the 11th Circuit's contention that direct advancement alone is sufficient to "preserve a statute."

To the direct contrary, of the 11th Circuit's assertion, *Went For It*, instead states, "... the government must demonstrate that the restriction on commercial speech directly and materially advances that interest..." *Florida Bar v. Went For It, Inc.*, 115 S.Ct. 2371, 2376 (1995). (Emphasis supplied)

The 11th Circuit makes no finding that City's ordinance materially advanced its legitimate interests. The 11th Circuit, of course, could not make this finding, given the above language of the trial court. This is no small point. The Supreme Court has required that such harms will be alleviated to a material degree by the restriction. (Emphasis supplied) *Edenfield v. Fane*, 507 U.S. 761 (1993). No such finding exists in the 11th Circuit's opinion. *44 Liquormart* provides that:

> "In evaluating the ban's effectiveness in advancing the State's interest, we not that a commercial speech regulation 'may not be sustained if it provides only ineffective or remote support for the government's purpose.' *Central Hudson*, 447 U.S. at 564. For that reason, the State bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so 'to a material degree.', *Edenfield*, 507 U.S. at 771; see also *Rubin v. Coors Brewing Co.*, 514 U.S., at __ The need for the State to make such a showing is particularly great given the drastic nature of its chosen means, the wholesale suppression of truthful, nonmisleading information."

Neither the City's original evidence, nor the trial court's Findings of Fact and Conclusions of Law, nor most recently, the opinion of the 11th Circuit meet the required standard of the previous decisions of this Court in regard to suppression of commercial speech.

C. The 11th Circuit Has Decided An Important Question of Federal Law That Has Not Been, but Should Be, Settled by this Court.

In a concurring opinion, one Justice has stated that the analysis set forth in *Central Hudson* and refined in *Fox* affords insufficient protection for truthful, non-coercive commercial speech concerning lawful activities. *Discovery Network* at 431.

In *Discovery Network*, this Court expressly reserved the question whether regulations not directed at the content of commercial speech or adverse effects stemming from that content should be evaluated under the standards applicable to regulations of fully protected speech. Sciarrino asserts that this Court should grant the herein Petition for Certiorari to answer that question in the affirmative. Sciarrino urges that it is time for the Court to hold that truthful, non-coercive commercial speech concerning lawful activities is entitled to full First Amendment protection.

Sciarrino's case demonstrates, as did *Discovery Network*, that there appears little reason to treat truthful commercial speech as less "valuable" than its brethren, non-commercial speech. In *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), this Court held that commercial speech "which does 'no more than propose a commercial transaction' " is protected by the First Amendment. *Id.* at 762, quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973). The Court focused principally on the First Amendment interests of the listener noting that "the particular consumer's interest in the free

flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate," 425 U.S. at 763, and that

> [t]he free flow of commercial information is indispensable . . . to the proper allocation of resources in a free enterprise system . . . [and] to the formation of intelligent opinions as to how that system ought to be regulated or altered.

Id., at 765. See also *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

Government may, as held by this Court, regulate commercial speech in ways that it may not regulate protected noncommercial speech to ensure that it is not false, deceptive, misleading, or that it is not coercive. *Virginia Pharmacy Bd.*, 425 U.S. at 770-772. and *Ohralik v. Ohio State Bar Assn.*., 436 U.S. 447, 457 (1978). Government also may prohibit commercial speech proposing unlawful activities. *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. at 388. See *Bates v. State Bar of Arizona*, 433 U.S. at 384. n1. In sum, the commercial speech that this Court has permitted government to regulate or proscribe was commercial speech that did not "serve individual and societal interests in assuring informed and reliable decision making." *Bates* at 364.

In 1980, the majority in *Central Hudson* reviewed the Court's earlier commercial speech cases and determined that the Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." 447 U.S. at 563. This "lesser protection" did not derive from the fact that commercial speech "is of less constitutional moment than other forms of speech."as the *Central Hudson* majority asserted. Id., at n. 5.[5]

---

[5] *Central Hudson's* conclusion that commercial speech has less

The *Central Hudson* majority went on to develop a four-part analysis commensurate with the supposed intermediate status of commercial speech. Under that test, a court reviewing restrictions on commercial speech must first determine whether the speech concerns a lawful activity and is not misleading. If the speech does not pass this preliminary threshold, then it is due no First Amendment protection. Id., at 566. If it does pass the preliminary threshold, then the government is required to show (1) that the asserted government interest is "substantial," (2) that the regulation at issue"directly advances" that interest, and (3) that the regulation "is not more extensive than is necessary to serve that interest." Id.

This Court further developed this test in *Board of Trustees of State University of N.Y. v. Fox*, 492 U.S. at 480, to clarify that a regulation limiting commercial speech can, in fact, be more extensive than is necessary to serve the government's interest as long as it is not unreasonably more extensive. This intermediate level of scrutiny is a far cry from strict scrutiny, under which the government interest must be "compelling" and the regulation "narrowly tailored" to serve that interest. See, e.g., *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, (1990). The *Central Hudson* reference to "misleading" speech appears to include speech which may be inherently coercive, such as in-person solicitation. See 447 U.S. at 563, citing *Ohralik*, 436 U.S. at 464-465.

---

moment than non-commercial speech seems to stem from a passage from Ohralik: "We . . . have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." *Ohralik v. Ohio State Bar Assn.*, 436U.S. 447, 456, 56 L. Ed. 2d 444, 98 S. Ct. 1912 (1978).

Pursuant to the analysis adopted by the *Central Hudson* majority, misleading and coercive commercial speech and commercial speech proposing illegal activities are addressed by the first prong of its four-part test.

Given the obvious direction of this Court's post-*Central Hudson* decisions, it appears no longer appropriate that commercial speech which survives the first prong -- i.e., that the speech is not misleading or coercive and that it concerns lawful activities --is entitled only to an intermediate level of protection.

Sciarrino asserts that *Central Hudson's* first prong is the only necessary prong to provide for the full exercise of his truthful First Amendment speech. The weight of evidence appears to suggest that *Central Hudson's* additional prongs provide improper advantage to a government desiring to limit commercial speech.

For example, as indicated in *Discovery Network* and the instant case, both the City of Cincinnati and Respondent City of Key West, herein, could rely on this Court's broad statements that commercial speech "is of less constitutional moment than other forms of speech," Id., at 563, n. 5, and also occupies a "subordinate position in the scale of First Amendment values," *Ohralik*, 436 U.S. at 456. Both cities knew that, under *Central Hudson*, their restrictions on commercial speech would be likely to be examined with less fervor and with less rigid scrutiny than any restrictions it might impose on other more valued speech.

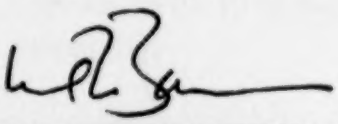
It should be constitutionally sufficient that government remains free to ensure that commercial speech is not deceptive or coercive, as well as free to prohibit commercial speech proposing illegal activities. It is time that the Court abandoned *Central Hudson's* multi-part analysis in favor of a less subjective test that affords full protection for truthful, non-coercive commercial speech concerning lawful activities.

CONCLUSION

Petitioner Sciarrino, for the reasons herein stated, prays the Court will grant the herein Petition for Certiorari.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above and foregoing was sent by Federal Express Mail to Michael T. Burke, P.O. Box 030220, Ft. Lauderdale 33303-0220 and by U.S. Mail to the, City Attorney, City of Key West, Florida, PO Box 1409 Key West, Florida, 33041, this 12 th day of November, 1996.



MICHAEL R. BARNES
Counsel of Record
RICHARD L. WILSON
MICHAEL R. BARNES, P.A.
Attorney for Petitioner
513 Whitehead Street
Key West, Florida 33040
(305) 296-5297

Appendix A -- Opinion of the United States District Court for the Southern District of Florida, Decided October 27, 1994.

JAMES P. SCIARRINO, an individual d/b/a CLANCY'S GOURMET PIZZA; and WADE FERREL, an individual, Plaintiffs, v. CITY OF KEY WEST, a Florida municipal corporation, Defendant.

CASE NO. 93-10031-CIV-KING

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

867 F. Supp. 1017; 1994 U.S. Dist. LEXIS 16084, 8 Fla. Law W. Fed. D 490

October 27, 1994, Decided

JUDGE: JAMES LAWRENCE KING

OPINION: FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Findings of Fact

In response to various complaints by pedestrians and property owners, the City of Key West (the "City") sought to limit the use of "barkers" who solicited customers for business purposes along various streets and beaches in Key West's Historic District. Businesses such as restaurants and time-share apartments hired barkers to approach pedestrians, engage in face-to-face advertising, distribute printed advertising materials

and solicit customers for area businesses. The activities of barkers are referred to as "off-premises canvassing" ("OPC").

In response to complaints received regarding the activities of the barkers, the City conducted a workshop meeting on November 12, 1991 to discuss the problems caused by OPC activity. The City drafted a proposed ordinance and held public hearings regarding the proposed ordinance on March 3, 1992 and March 17, 1992. During these public hearings, numerous proponents of the ordinance described the problems caused by OPC activity in the historic district. These problems included: sidewalk congestion, invasion of pedestrian privacy, litter, impact on businesses proximate to where the OPC activity occurred and damage to the tourist-friendly atmosphere that Key West attempts to cultivate. At the conclusion of the March 17, 1992 meeting, the Key West City Commission adopted Ordinance No. 92-12 and created Sections 94.01-10 of the Key West Code of Ordinances (the "Ordinance").

The Ordinance prohibits OPC activity on publicly-owned parking lots, beaches and Mallory Dock. It also imposes limitations on OPC activity on Duval Street, Front Street, Clinton Square, and parts of Simonton and Whitehead Streets. The Ordinance does not completely ban OPC activity, but rather limits the location of OPC activity and the number of off-premises canvassers per business.

The Ordinance also establishes a permitting system for persons who seek to engage in OPC activity on publicly-owned land. Each off-premises canvasser must submit an application containing his or her name, date of birth, business represented and business address and telephone number. Proof of citizenship or an applicable work permit is also required.

After promulgation of the Ordinance, the City noticed a decrease in the amount of litter created by discarded advertising materials. The City also received fewer complaints regarding unwanted solicitation and sidewalk congestion. However, the Ordinance has not solved all the problems that the Ordinance was designed to remedy.

Plaintiff nl James P. Sciarrino ("Sciarrino") owns and operates a restaurant under the trade name "Clancy's Gourmet Pizza." The restaurant is located on Charles Street, one of several side streets which are perpendicular to heavily traveled Duval Street. Prior to the enactment of the Ordinance, Plaintiff relied heavily on OPC activity on Duval Street to solicit customers for his restaurant. Subsequent to the adoption of the Ordinance, Sciarrino employed and/or contracted with persons who engaged in OPC activity on behalf of Clancy's Gourmet Pizza.

nl The Court finds that Plaintiff Wade Ferrel, who leases the property to Plaintiff Sciarrino and who does not employ off-premises canvassers, lacks standing to challenge the Ordinance.

II. Conclusions of Law

A. First Amendment Challenge

It is axiomatic that the public streets are a quintessential public forum. United States v. Grace, 461 U.S. 171, 177, 75 L. Ed. 2d 736, 103 S. Ct. 1702 (1983) ("'Public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks and parks, are considered, without more, to be 'public forums.'"). The Ordinance, which applies to certain speech on the public streets, restricts commercial speech, n2 which is speech that proposes a commercial transaction. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer

Council, Inc., 425 U.S. 748, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976). Commercial speech has traditionally been given less protection under the First Amendment than non-commercial or "pure" speech. Id. (commercial speech entitled to First Amendment protection); Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980) (commercial speech afforded less protection under First Amendment than noncommercial speech).

n2 Plaintiff contends that the Ordinance covers commercial and non-commercial speech. The Court finds that this argument is without merit because the terms of the ordinance restrict only OPC activity and off-premises canvassing is defined as "distribution of information or solicitation of customers on a street, sidewalk, or other publicly owned right-of-way in connection with a business." Key West, Fla. Code of Ordinances @ 94,02.

Central Hudson Gas Analysis

The Supreme Court in Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980), set forth a four-part test to determine if a restriction on commercial speech is constitutionally valid. The four prongs are as follows: (1) the speech must be truthful and concern lawful activity; (2) the government must have a substantial interest in restricting the speech; (3) the regulation must directly advance the asserted governmental interest and (4) the regulation must be narrowly tailored to serve the governmental purpose. n3

n3 The Supreme Court modified the fourth prong of the Central Hudson analysis in Board of Trustees of State Univ. of New York v. Fox, 492 U.S. 469, 478, 106 L. Ed. 2d 388, 109 S. Ct. 3028 (1989), so that the inquiry is whether the restriction is

narrowly tailored to serve the governmental interest. Previously, the fourth prong inquired whether the means were no more restrictive than necessary.

1. Is the speech truthful and does it concern lawful activity?

In order to receive First Amendment protection, commercial speech must be truthful and must relate to lawful activity. Neither party contests the fact that the speech in *issue is* truthful and relates to lawful activity, Therefore, the Court finds that the speech regulated by the Ordinance is protected commercial speech.

2. Is there a substantial governmental interest in restricting the speech?

Defendant contends that three substantial governmental interests n4 exist for regulating commercial speech though the Ordinance. First, the City argues that off-premises canvassers harass tourists and pedestrians walking along the. streets and beaches of the Historic District and invade pedestrian privacy. The City contends that prevention of this invasion of privacy is a substantial governmental interest. See Hays County Guardian v. Supple, 969 F.2d 111, 119 (5th Cir. 1992), cert. denied, 122 L. Ed. 2d 371, 113 S. Ct. 1067 (1993) (although finding a university's restriction on distribution of newspapers unconstitutional, the Court found that the university had a legitimate interest in preventing invasion of privacy). Plaintiff contests this interest and claims that protection of pedestrian privacy is not a substantial governmental interest. The Court finds that protection of pedestrian privacy is a substantial governmental interest. "Even solicitation that is neither fraudulent nor deceptive may be pressed with such frequency or vehemence as to intimidate, vex, or harass the recipient." Edenfield v. Fane, 123 L. Ed. 2d 543, 113 S. Ct. 1792, 1799

(1993) (citing Ohralik v. Ohio State Bar Assn.., 436 U.S. 447, 462, 56 L. Ed. 2d 444, 98 S. Ct. 1912 (1978) for the proposition that protection of privacy is a legitimate state interest).

n4 The City also proffered a fourth reason for the Ordinance--the preservation of the aesthetics and tourist-friendly atmosphere of the Historic District. This interest derives from the City's analogy of off-premises canvassers to "human signs" and the First Amendment jurisprudence regarding sign ordinances. However, the Court does not find this to be an apt analogy and therefore finds that aesthetic concern is not a substantial governmental interest advanced by the Ordinance. Additionally, a "tourist-friendly" atmosphere is too amorphous a concept to constitute a substantial governmental interest.

The second asserted governmental interest is the reduction of sidewalk congestion. The areas of Key West that are subject to the Ordinance experience heavy pedestrian and automobile traffic. Plaintiff concedes that this is a substantial governmental interest.

The third governmental interest asserted is reduction in litter. The City argues that many pedestrians discard OPC materials soon after receiving them and that the City has an interest in reducing this type of litter. Plaintiff concedes that this is a substantial governmental interest.

Thus, the Court finds that the City has a substantial governmental interest in protecting pedestrian privacy, reducing congestion and preventing litter.

3. Does the regulation directly advance the asserted governmental interests?

The Ordinance does not completely proscribe OPC activity. Rather, it limits the number of canvassers, restricts the location of the canvassing, and requires permits for off-premises canvassers. As such, it does not completely eliminate the problems that the Ordinance seeks to solve. However, the Ordinance does not need to completely solve the problems, it must merely directly advance the governmental interest. "The City may 'directly advance' its interest by pursuing a partial solution to its problems, a proposition confirmed by the Supreme Court in Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 69 L. Ed. 2d 800, *101 S.* Ct. 2882 (1981)." Supersign of Boca Raton, Inc. v. City of Fort Lauderdale, 766 F.2d 1528, 1531 (11th Cir. 1985).

By restricting OPC activity through the Ordinance, the City advances its goal of protecting pedestrian privacy by limiting the harassing conduct of the off-premises canvassers. This conclusion is buttressed by a decrease in the number of complaints regarding OPC activity.

The Ordinance also directly advances the City's second goal of reducing congestion in the City's Historic District, Plaintiff argues that the City streets are always congested due to heavy tourist flow and street performers, who cause tourists to stop and gather around to watch their performances. Plaintiff is correct that congestion continues to be a problem for Key West and that the Ordinance does not significantly reduce this problem. However, the Ordinance removes OPC activity from the most congested thoroughfares in the Historic District, thereby providing a tangible, if modest, reduction in sidewalk congestion.

Although the Key West Historic District is a heavily trafficked area which is subject to litter problems, Felix Cooper, the Key West City Manager, testified that the OPC activity

contributed to this litter problem and that the Ordinance reduced the litter caused by OPC activity.

In sum, the Ordinance directly advances all three of the City's asserted interests.

4. Is the regulation narrowly tailored to serve the governmental purpose?

The fourth prong of the Central Hudson analysis focuses on the "fit" between the regulation and the substantial governmental interests. Plaintiff relies on City of Cincinnati v. Discovery Network, Inc., 123 L. Ed. 2d 99, 113 S. Ct. 1505 (1993) for the proposition that the Ordinance is not narrowly tailored to serve the governmental interests asserted. In Discover Network the Supreme Court found that Cincinnati's complete ban on commercial newsracks was unconstitutional where Cincinnati did not prohibit non-commercial newsracks and where the regulation did not directly advance the governmental interest underlying the regulation. The Court found that while aesthetics and safety were legitimate interests, a regulation banning sixty-two commercial newsracks while allowing 1500-2000 non-commercial newsracks violated the First Amendment. Cincinnati's distinction between commercial and non-commercial speech lacked a close relationship to the governmental interests. Discovery Network, 113 S. Ct. at 1514. This was especially problematic where non-commercial speech, which the regulation did not restrict, caused the vast majority of the safety and aesthetic impairment.

Unlike the Cincinnati regulation, the Ordinance is not a "categorical ban" on OPC activity. The Ordinance simply limits the number of off-premises canvassers per business and the location of OPC activity. Were Key West to completely prohibit OPC activity throughout the entire city, such a ban

would be impermissible, However, the modest restrictions imposed by the Ordinance do not run afoul of the First Amendment. Moreover, while the Cincinnati ordinance did not promote improved aesthetics or safety, the Ordinance does protect pedestrian privacy and, to a lesser degree, reduce litter and congestion.

A tenuous fit existed between the Cincinnati regulation and the asserted interests where the City restricted only commercial speech, despite the fact that non-commercial speech caused the bulk of the problem. In contrast, the opposite is true in Key West. Commercial OPC activity causes the harms that the Ordinance is designed to remedy. Non-commercial hand billing in Key West is not a significant cause of congestion, invasion of pedestrian privacy or litter. Finally, the Discovery Network Court made clear that the "holding, however, is narrow. As should be clear from the above discussion, we do not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial newsracks." Id. at 1516.

Thus, the ordinance satisfies all four prongs of the Central Hudson Gas analysis and does not violate the First Amendment of the United States Constitution.

B. Florida Statute @ 166.0443

Having found that the Ordinance is valid under the First Amendment, the Court now examines the Ordinance's validity under Florida Statute @ 166.0443 n5 (the "Statute"). Plaintiff contends that the Statute invalidates the Ordinance. Specifically, Florida Statute @ 166.0443 prohibits municipalities from enacting any ordinance that requires the "registration or background screening of any individual engaged

in or applying for a specific type or category of employment in the county or municipality or requires the carrying of an identification card issued as a result of such registration or screening . . .'I (emphasis added). Plaintiff asserts that the Ordinance's permit provisions violate the Statute by requiring registration or background screening in connection with employment as an off-premises canvasser. However, the Statute does not invalidate the Ordinance because it does not require the registration or background screening of individuals who wish to obtain employment as an off-premises canvasser. Under the Ordinance, only persons who seek to conduct commercial advertising or solicitation in certain areas of the Key West Historic District must obtain permits. An off-premises canvasser may work without a permit in any area of Key West unregulated by the Ordinance. The OPC Ordinance thus focuses on the activity and location off-premises canvassers rather than on their employment.

n5 Florida Statutes @ 166.0443 provides, in full:

Except as authorized by law, no county or municipality shall enact or enforce any ordinance, resolution, rule, regulation, policy, or other action which requires the registration or background screening of any individual engaged in or applying for a specific type or category of employment in the county or municipality or requires the carrying of an identification card issued *as* a result of such registration or screening, whether or not such requirement *is* based upon the residency of the person, However, an ordinance that regulates any business, institution, association, profession, or occupation by requiring background screening, which may include proof of certain skills, knowledge, or moral character, is not prohibited by this section, provided that such regulation:

(a) Is not preempted to the state or is not otherwise prohibited by law:

(b) Is a valid exercise of the police power;

(c) Is narrowly designed to offer the protection sought by the county or municipality; and

(d) Does not unfairly discriminate against any class of individuals.

(2) This section shall not be construed to prohibit any employer, including a local government, from investigating the background of employees or prospective employees or from requiring employees to carry an identification card or registration card.

Assuming arguendo that the Ordinance violates the main section of the Statute, the Ordinance is a valid regulation under the "savings" clause of @166.0443. This clause exempts ordinances that would otherwise violate the terms of the Statute if the regulation (a) is not preempted to the state or prohibited by law; (b) is a valid exercise of police power; (c) is narrowly tailored to serve the protection sought and (d) does not unfairly discriminate against any class of individuals. The Court finds that the Ordinance meets the requirements of this savings clause and thus does not violate Florida Statute @ 166.0443.

III. Conclusion

Accordingly, after a careful review of the record, and the Court being fully advised, it is

ORDERED and ADJUDGED that final judgment be, and the same is hereby, entered in favor of Defendant. The validly

enacted Ordinance does not violate the First Amendment or Florida Statute @ 166.0443. Therefore, Plaintiff's request for injunctive relief, declaratory relief and damages is denied. The City may enforce the Ordinance. Defendant is hereby ordered to submit a proposed final judgment to the Court within ten (10) days.

DONE and ORDERED in Chambers at the United States District Courthouse, Federal Justice Building, Miami, Florida, this 27th day of October, 1994.

JAMES LAWRENCE KING
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Appendix B -- Opinion of the 11th Circuit Court of Appeal Decided May 16, 1996.

James P. SCIARRINO, an individual, d/b/a Clancy's Gourmet Pizza, Plaintiff-Appellant, Wade Ferrel, an individual, Plaintiff, v. CITY OF KEY WEST, FLORIDA, a Florida Municipal Corporation, Defendant-Appellee.

No, 95-4070

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

83 F.3d 364; 1996 U.S. App. LEXIS 11348;
9 Fla. Law W. Fed. C 1104

May 16, 1996, Decided

PRIOR HISTORY: Appeal from the United States District Court for the Southern District of Florida. (No. 93-10031-CIV). James Lawrence King, Judge.

DISPOSITION: AFFIRMED,

COUNSEL: ATTORNEY(S) FOR APPELLANT(S): Michael R. Barnes, Key West, FL. Richard L. Wilson, Orlando, FL.

ATTORNEY(S) FOR APPELLEE(S): Michael T. Burke, JOHNSON, ANSELMO, MURDOCH, BURKE & GEORGE, P.A., Ft. Lauderdale, FL.

JUDGES: Before EDMONDSON and BIRCH, Circuit Judges, and FOREMAN, * Senior District Judge.

* Honorable James L. Foreman, Senior U.S. District Judge for the Southern District of Illinois, sitting by designation.

OPINION: EDMONDSON, Circuit Judge:

This case involves the regulation of commercial speech, In Key West's historic district, businesses used to seek customers by employing "barkers" to distribute handbills to pedestrians and to engage in face-to-face advertising. The city labeled the barking activities of these businesses "off-premises canvassing" ("OPC") and banned such conduct in specified areas: on public beaches, on Mallory Dock, and in public parking lots. See Key West, Fla., Code @ 94.05. Also, OPC activity was significantly restricted, but not banned, on five historic streets heavily trafficked by pedestrians. See id. @ 94.06. In addition, the city established a permitting system for OPC barkers who sought to work on public lands. For the permit, barkers apply by filling out an application, listing the business employer, and proving citizenship or work eligibility. Id. @ 94.03.

The city's stated aims in passing the Ordinance were reducing litter, sidewalk congestion, and invasions of pedestrians' privacy. The Ordinance was challenged on First Amendment and state law grounds by Plaintiff Sciarrino, owner of Clancy's Gourmet Pizza, which is just off one of the busy streets on which OPC activity is now restricted; Clancy's engages in prohibited OPC activity, Sciarrino sought damages and permanent injunctive relief preventing enforcement of the Ordinance. After a bench trial, the judge ruled in favor of the city on the First Amendment and pendent state claims. We affirm the judgment.

I.

The Supreme Court has held that a state law drawing a distinction between commercial and non-commercial speech, as does the OPC ban, is not a mere time, place, and manner restriction. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 430, 113 S. Ct. 1505, 1517, 123 L. Ed. 2d 99 (1993). Therefore, the statute at issue must be judged against the Court's jurisprudence on restrictions on commercial speech.

In Rubin v. Coors Brewing Co., U.S. 115 S. Ct. 1585, 1589, 131 L. Ed. 2d 532 (1995), the Court stressed that

> the free flow of commercial information is "indispensable to the proper allocation of resources in a free enterprise system' because it informs the numerous private decisions that drive the system. Indeed ... a "particular consumer's interest in the free flow of commercial information ... may be as keen, if not keener by far, than his interest in the day's most urgent political debate.'

Id. (citations and alteration omitted).

Still, the Court has recognized the "common-sense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." See Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56, 98 S. Ct. 1912, 1918, 56 L. Ed. 2d 444 (1978) (citation and internal quotation marks omitted). So, the constitution in reality grants "less protection to commercial speech than to other constitutionally safeguarded forms of expression." Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64-65, 103 S. Ct. 2875, 2879, 77 L. Ed. 2d 469 (1983) (citing Central Hudson Gas & Elec. Corp. v. Public Serv.

Comm'n of New York, 447 U.S. 557, 562-63, 100 S. Ct. 2343, 2349-50, 65 L. Ed. 2d 341 (1980)),

Thus, in *Central Hudson*, the Court set out a four-part test to determine the constitutionality of restrictions on commercial speech. Pursuant to that test, the court must first determine that the speech is not misleading and concerns lawful activity. 447 U.S. at 563-64, 100 S. Ct. at 2350. If so, the First Amendment applies; and the government must prove that it has a substantial interest in its stated basis for the statute, that the regulation directly advances that interest, and that the regulation is narrowly drawn to avoid unduly burdening speech. Id. The party arguing the restriction's validity has the ultimate burden of justifying it. Edenfield v. Fane, 507 U.S. 761, 770, S.Ct. 1792, 1800, 123 L. Ed. 2d 543 (1993).

Here, the state has conceded that the prohibited OPC activity is not misleading and concerns lawful activity. We discuss each remaining element of the Central Hudson framework individually.

II.

A.

To find a "substantial interest," a court must conclude both that the interest advanced by the state is legitimate in theory, and that that interest is in remedying a problem that exists in fact (or probably would exist, but for the challenged legislation). In Coors Brewing, U.S. at 1 115 S. Ct. at 1591, the government sought to justify the legislation by asserting the federal government's interest in "facilitating" state efforts to regulate alcohol. The Court rejected this asserted interest:

> We conclude that the Government's interest in preserving state authority is not sufficiently substantial to meet the

> requirements of Central Hudson. Even if the Federal Government possessed the broad authority to facilitate state powers, in this case the Government has offered nothing that suggests that States are in need of federal assistance.

Id. *See also Edenfield*, 507 U.S. at 768, 113 S. Ct. at 1798-99 (noting that courts should not ignore factual indications that state has obscured its real reason for regulating).

Here, however, the County has asserted valid goals, and the record supports the State's assurance that the stated problems are the actual ones sought to be redressed. Again, the state's asserted interests are preventing the harassment of pedestrians by barkers; reducing pedestrian traffic; and reducing litter. The Supreme Court has explicitly concluded that preventing vexation or harassment of the listener constitutes a legitimate state interest. See Edenfield, 507 U.S. at 769, 113 S. Ct. at 1799 (citing Ohralik, 436 U.S. at 462, 98 S. Ct. at 1921). And, we have concluded that preserving aesthetics is a valid interest. See Supersign of Boca Raton v. City of Ft. Lauderdale, 766 F.2d 1528, 1530 (11th Cir.1985) ("The objectives served by the ordinance, traffic regulation and aesthetic improvement, undoubtedly qualify as substantial governmental interests."). The state's interest here is in preserving aesthetics through the reduction of litter.

At trial, the city elicited the testimony of various witnesses to establish that these harms were sufficiently real and that the city was sufficiently appraised of them, and this testimony was properly credited by the district court. Witnesses described the frequency of harassment nl and the litter problems n2 associated with the OPC activity. (The City also introduced a thirty minute videotape depicting the situation the Ordinance was designed to

remedy.) Therefore, we are satisfied that the County has articulated a substantial interest under Central Hudson. n3

n1 Key West's City Attorney, Sadele Virginia Stones, related the testimony--received at public hearings held by the city--about the harassment and delay associated with OPC encounters. She testified to her observation that barkers would congregate in particular areas, resulting in increased congestion and also in altercations among barkers.

Captain McNeill of the Key West Police Department testified that before the Ordinance's passage, walking in the historic district became such a hassle. You couldn't walk but part of a block until someone would be blocking you and handing you a flyer ... trying to hustle you to some business or another .... If I was out in uniform we started to get a lot of complaints from tourists and business people.

Virginia Panico, Executive Vice President of the Key West Chamber of Commerce, testified that her office received "hundreds" of complaints from businesses upset with the OPC activity. In addition, George Cooper, the city manager for the City of Key West, testified that one walking on Duval Street in the evening could expect to be approached several times by the barkers and that the barkers were "very irritable." He estimated that his office received thirty phone calls about off-premises canvassing activity.

n2 Virginia Panico described having to clean up the volume of menus and handbills left on the street and ledge outside the Chamber of Commerce building. Mr. Cooper, the city manager, also testified that he personally observed pedestrians throwing handbills on the streets on several occasions.

n3 We are not unmindful of Appellant's suggestion that the actual reason for the regulation was anti-competitive pressure--fear among owners of Duval Street businesses of competition from the businesses engaged in OPC activity. Cf. Edenfield, 507 U.S. at 768, 113 S. Ct. at 1798-99 (courts should question whether the asserted justification for regulating is the real one). But, the record indicates that the problem stemmed at least in part from OPC activity by businesses not directly competing with the complaining businesses. For example, Virginia Panico testified that time-share resorts and glass-bottom boat companies were sources of litter and complaints; and Mr. Cooper concurs that the initial source of the problem was time share companies, not restaurants. These businesses would appear to be businesses not directly in competition with storefront owners on Duval Street.

B.

Restrictions on commercial speech must not only address a valid problem. but must also contribute effectively to the solution--this is the "direct advancement" element of the Central Hudson test. The focus in this stage of our study is on whether the evidence supports the idea that the regulation will actually work, *See Edenfield,* 507 U.S. at 771, 113 S. Ct. at 1800 (party seeking to justify commercial speech restriction must prove that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree"), *Central Hudson*, 447 U.S. at 564, 100 S. Ct. at 2350 ("The regulation may not be sustained if it provides only ineffective or remote support for the government's purpose.").

The party defending the regulation must present some concrete indications that the regulation will have the intended effect. E.g., *Edenfield*, 507 U.S. at 771, 113 S. Ct. at 1800 (holding no material advancement where state "presents no

studies" showing likely success of regulation, and where record "does not disclose any anecdotal evidence" to validate the government's suppositions regarding effectiveness); Florida Bar v. Went For It, Inc., --U.S. 115 S. Ct. 2371, 2377, 132 L. Ed. 2d 541 (1995) (distinguishing Edenfield, because Florida Bar Association presented extensive statistical analyses); Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051, 1053 n. 8 (11th Cir, 1987) (upholding ban on display of portable signs based on deposition testimony and photographs in record "confirming an unsightly visual cluster") (record citation omitted). n4

n4 In the set of cases where the regulatory scheme is self-evidently destined to succeed or fail, the Court *has passed* on the constitutionality of the speech restrictions without extensive examination of the available evidence, Compare Posadas de Puerto Rico *Assocs.* v. Tourism Co. of Puerto Rico, 478 U.S. 328, 343-42, 106 S. Ct. 2968, 2977, 92 L. Ed. 2d 266 (1986) (evident on face of regulatory scheme that it will work) with Coors Brewing, U.S. at 115 S.Ct. at 1592 (evident on face of scheme that it will not work).

Here, it is far from self-evident whether the regulation will fail or succeed in its goals, Therefore, the determination of this case depends on our fact-intensive record analysis. See generally Don's Porta Signs, 629 F.2d at 1053 n. 9 ("In cases involving first amendment claims, an appellate court must make an independent examination of the whole record,"); see also id. (clearly erroneous standard does not apply to determinations of whether regulation directly advances government interest in First Amendment cases).

The issue before us is thus whether, in our independent estimation, the design of the statute and the early evidence about its impact indicate the regulatory scheme will achieve its goals. We conclude that the City presented sufficient evidence to

support the district court's conclusion that the statute will advance its goals. In particular, the City introduced extensive anecdotal evidence that the Ordinance reduced the number of instances of pedestrian congestion and harassment n5 in the City's historic district.

n5 Ms. Panico of the Chamber of Commerce estimated that the number of barkers by her office in Mallory Square dropped to "three to five" after the ordinance, from their pre-ordinance levels of "a minimum of fifteen to maybe a maximum of thirty." She also testified to "marked improvement" in pedestrian traffic at certain intersections. George Cooper, the city manager, testified that the volume of complaints about pedestrian harassment "was reduced," although "it hasn't been eliminated entirely." And, significantly, Capt. McNeill stated that as business owners came into compliance with the ordinance, the number of complaints about OPC harassment dropped off sharply. He also testified that he personally witnessed a marked decrease in the aggressiveness of the barkers as they came into compliance. In addition, Ms. Stones, the former City Attorney, testified that following enactment, "complaints from the public [about OPC activity] were substantially reduced if not eliminated."

The district court ultimately concluded that the Ordinance directly advanced all three of the city's asserted interests. But, the court indicated that the Ordinance had only a "tangible, if modest" impact on sidewalk congestion in the historic district. n6 And, though the district court found, based on City Manager Cooper's testimony, an appreciable reduction in litter after the Ordinance passed, we find Cooper's testimony to be devoid of a statement to that effect. Nonetheless, the statute still survives constitutional scrutiny, because the Supreme Court has indicated that direct advancement of even one substantial interest is sufficient to preserve a statute. See Florida Bar v. Went For It,

Inc., U.S. n. 1, 115 S. Ct. 2371, 2376 n. 1, 132 L. Ed. 2d 541. From our independent examination of the record, we conclude that Key West has satisfactorily established that the Ordinance directly advances the substantial interests of reducing pedestrian congestion and reducing harassment of pedestrians. n7

n6 In view of the testimony cited above, we think the record supports an inference that pedestrian congestion was reduced considerably. And if there were contrary indications, they seem to be attributable to the increase, recounted by Captain McNeill, in the overall level of visitors to Key West over the last several years.

n7 And, we reject the "underbreadth" strains of the Appellant's argument. The Supreme Court has conclusively indicated that a regulation may "directly advance" its asserted ends, though it strikes at less than the entire problem. For example, in Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981) (plurality opinion), the Court noted the statute was effective in fact and concluded simply that "this [effectiveness] is not altered by the fact that the ordinance is under inclusive because it permits onsite advertising [while prohibiting offsite advertising]." 453 U.S. at 511, *101* S. Ct. at 2894.

Thus, we cannot accept Appellant's argument that because there are other sources of congestion, harassment, and litter, "the ban on the distribution of written material "in connection with a business' is not a reasonable fit between the goal of preventing litter and the means used to accomplish that goal.,' And, Cincinnati v. Discovery Network, 507 U.S. 410, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993), is not to the contrary. That case overturned a narrow ban on commercial newsracks, where the majority of the city's newsracks were noncommercial; but the Court relied not on the statute's underbreadth per *se so* much

as on the irrationality of the content discrimination between commercial and noncommercial speech. Rejecting Cincinnati's explanation for the restriction's narrow breadth, the Court wrote that "the city's argument attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech." 507 U.S. at 419, 113 S. Ct. at 1511.

Here, there has been no commensurate showing of irrationality in banning the OPC activity of businesses only (there has been no showing that non-business OPC activity existed). Thus, Appellant's argument, that the ordinance is invalid because it fails to address the preponderance of the underlying problem, is without merit.

C.

The last element of the Central Hudson analysis inquires whether the statute reaches farther than is necessary. We conclude it does not.

The issue is whether the City has successfully "demonstrated that its interest cannot be protected adequately by more limited regulation of appellant's commercial expression." Central Hudson, 447 *U.S.* at 570, 100 *S.* Ct. at 2354. This standard does not require the city to employ the "least restrictive means" imaginable. See Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 109 *S.* Ct. 3028, 106 L. Ed. 2d 388 (1989). There, the Supreme Court "focused upon this specific issue for the first time," 492 U.S. at 477, 109 S. Ct. at 3033, and concluded that commercial speech protection demands "not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective." 492 U.S. at 480, 109 S. Ct. at 3035.

The burden to justify the extent of the restrictions nonetheless remains with the would-be regulator, Id. Here, we

conclude the state has carried its burden of showing the restrictions to be narrowly tailored. The record evidences an absence of the "numerous and obvious less-burdensome alternatives to the restriction on commercial speech," Discovery Network, 507 U.S. at 417 n. 13, 113 S. Ct. at 1510 n. 13, which might require invalidation on this ground. Instead, the record evidences a careful effort on the part of the City to draw a balance between the commercial speech rights of the proprietors and the problems the Ordinance addresses. n8

n8 Mr. Cooper, the city manager, testified that the city tried to broker "administrative" arrangements or informal "agreements" with businesses, but encountered frequent collective-action problems: "[An] organization would say, well, if they are not going to do it [then] I won't either .... Everyone seemed to say, if there is not going to be a formal rule about this we will do what we want to." Capt. McNeill's testimony also suggests that informal arrangements failed because the sentiment among businesspeople refraining from OPC activity was, "if all these people are going to do this I might have to do this to stay in business.,' The failure of these more limited attempts at redress demonstrates that the legislative measures enacted by the city are not so unduly burdensome *as* to offend Central Hudson. And, as the district court noted, the city stopped short of enacting an outright ban on OPC activity throughout the city.

III.

Appellants also contend that the Ordinance is invalid under Fla. Stat. @ 166,0443, which prohibits municipalities (not employers) from requiring the "registration of any individual engaged in a specific type of category of employment" and also precludes municipalities from requiring "the carrying of an identification card as a result of such registration." We agree

with the district court's conclusion that the Ordinance does not violate the Florida statute.

The district court read the statute as not applicable here, because the Ordinance requires registration of barkers based on the location of their canvassing activity. That is, the Ordinance requires registration based on the place, and not the "specific type or category" of the employment. This conclusion was confirmed by the fact that no permit or registration is required for barking activities other than in the locations specified in the Ordinance.

Discounting the accuracy of the district judge's conclusion that the statute does not apply, we agree that the Ordinance survives anyway because the terms of the savings clause contained in the statute are met: (1) Appellant does not contend the Ordinance is "preempted to the state or ... otherwise prohibited by law,," (2) it is a valid exercise of police power, (3) it is narrowly tailored, as described above; and (4) it does not unfairly discriminate against a class of persons. Id.166.0443(1)a-d. Therefore, the district court correctly concluded the statute does not prohibit enforcement of the Ordinance.

AFFIRMED.

Appendix C -- Order of the 11th Circuit Court of Appeals Denying Rehearing, filed August 14, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-4070

JAMES P. SCIARRINO, an individual, d/b/a Clancy's Gourmet Pizza,

Plaintiff-Appellant,

WADE FERREL, an individual,

Plaintiff,

versus

CITY OF KEY WEST, FLORIDA, a Florida Municipal Corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Before EDMONDSON and BIRCH, Circuit Judged, and FOREMAN*, Senior District Judge.

PER CURIAM:

The petition for rehearing filed by appellant, James

---

* Honorable James L. Foreman, United States Senior District Judge for the Southern District of Illinois, sitting by designation.

Sciarrino, is DENIED.

ENTERED FOR THE COURT
EDMONDSON
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
DEC 13 1996
CLERK

No. 96-751

In The

Supreme Court of the United States

October Term, 1996

JAMES P. SCIARRINO,

Petitioner,

vs.

CITY OF KEY WEST,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

MICHAEL T. BURKE
CHRISTINE M. DUIGNAN
Counsel of Record

JOHNSON, ANSELMO, MURDOCH, BURKE & GEORGE, P.A.
790 East Broward Boulevard
Suite 400
Fort Lauderdale, Florida 33301
(954) 463-0100

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

22pp

QUESTION PRESENTED FOR REVIEW

Should the Court, in its certiorari discretion, review *Sciarrino v. City of Key West, Florida*, 83 F.3d 364 (11th Cir. 1996) (Pet. App. A), which affirmed the District Court's (Southern District of Florida) decision, *Sciarrino v. City of Key West*, 867 F. Supp. 1017 (S.D. Fla. 1994) (Pet. App. B).

Stated otherwise, are there special and important reasons for the Court to exercise its certiorari jurisdiction where the Eleventh Circuit, in affirming the District Court's judgment that the commercial speech ordinance at issue does not violate the First Amendment, has not rendered a decision which conflicts with any other Federal Court on the same issue?

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents..... ii

Table of Authorities iii

Opinion and Judgment Below..... 1

Statement of the Case 2

Summary of the Argument 6

Argument 9

Conclusion 17

TABLE OF AUTHORITIES

Page

CASES:

44 Liquormart v. Rhode Island, 116 S.Ct. 1495 (1996) 8, 12, 13, 14, 15, 16

Board of Trustees of State University of New York v. Fox, 492 U.S. 469 (1989) 10

Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980) ..... *passim*

Edenfield v. Fane, 507 U.S. 761 (1993) 11

Florida Bar v. Went-For-It, Inc., 115 S.Ct. 2371 (1995) 11

Hays County Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992) 6, 7, 9, 10

Kastigar v. United States, 406 U.S. 441 (1972) 14

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) 10

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 12

Sciarrino v. City of Key West, 83 F.3d 364 (11th Cir. 1996) ..... *passim*

Sciarrino v. City of Key West, 867 F. Supp. 1017 (S.D. Fla. 1994) 1, 6, 10

Supersign of Boca Raton, Inc. v. City of Fort Lauderdale, 766 F.2d 1528 (11th Cir. 1985) 10

STATUTES:

Ordinance No. 92-12, City of Key West (commonly known as Off-Premises Canvassing or "OPC" Ordinance) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS:

First Amendment ..... *passim*

BRIEF IN OPPOSITION

Respondent, City of Key West, Florida, opposes the issuance of a writ of certiorari to review the judgment and affirmance of the United States Court of Appeals for the Eleventh Circuit Court and the United States District Court for the Southern District of Florida in the above-entitled case.

OPINION AND JUDGMENT BELOW

Following a bench trial, on October 27, 1994, the United States District Court for the Southern District of Florida issued Findings of Fact and Conclusions of Law. *Sciarrino v. City of Key West*, 867 F. Supp. 1017, 1020 (S.D. Fla. 1994). The District Court found for the City of Key West on Petitioner's claim that the subject ordinance violated the First Amendment and entered judgment accordingly. Specifically, the District Court concluded that the subject ordinance passes scrutiny under the test for commercial speech regulations set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

On May 16, 1996, after the parties had filed briefs and presented oral argument, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's judgment for the City of Key West. *Sciarrino v. City of Key West*, 83 F.3d 364 (11th Cir. 1996). Thereafter, Petitioner filed a Motion for Rehearing, which was denied on August 14, 1996, and is unreported.

STATEMENT OF THE CASE

The respondent submits the following brief Statement to correct several inaccuracies and omissions contained in Petitioner's Statement of the Case.

Petitioner has omitted the relevant context in which this case arises. Key West is a small city located at the end of a chain of islands extending from the southern tip of the Florida mainland. Key West couples a festive, tropical atmosphere with a Historic District which includes homes once inhabited by Ernest Hemingway and President Harry Truman. These features attract many visitors each year to Key West, many of whom are drawn to the Historic District.

Petitioner owns and operates a restaurant and bar known as Clancy's Gourmet Pizza ("Clancy's"). Clancy's is located approximately one-half block off of Duval Street in the heart of the Historic District.

Petitioner also fails to describe the activity being regulated. Prior to November 12, 1991, numerous businesses, including Petitioner's, employed or contracted with persons commonly known as "barkers." Barkers engaged in face-to-face advertising, including distribution of advertising materials to, and/or solicitation of, customers along the sidewalks and public right-of-ways within the City of Key West. This form of advertising, generally referred to as "off-premises canvassing," involved confronting pedestrians on the streets and urging them to patronize various businesses. This form of advertising had both visual and physical aspects – pedestrians would have printed advertisements literally foisted upon them. Additionally, this practice had audio aspects,

including the constant "hawking" of the various businesses; hence the moniker, "barkers."

Nor does Petitioner include that the regulation at issue was enacted in reaction to problems created by off-premises canvassing. In response to complaints[1] regarding the barkers and after extensive public hearings and workshops,[2] the City passed the Off-Premises Canvassing ("OPC") Ordinance.

Petitioner's most glaring omission is that he neglects to advise the Court of the nature of the OPC Ordinance. The most relevant characteristic of the OPC Ordinance is that it does ***not*** totally ban or eliminate any form of communication. Rather, the OPC Ordinance regulates, on a limited basis, the use of government owned streets, sidewalks, and public right-of-ways to persons who seek to engage in face-to-face advertising, distribution of

---

[1] Specifically, the complaints included claims that pedestrians could not walk down the sidewalk without constantly having advertising materials thrust upon them; increased trash because of the improper disposition of the advertising materials; increased congestion along the sidewalks; disputes between barkers competing for locations; and, on some occasions, merchants complained that the proliferation of off-premises canvassers obstructed or interfered with customers who wished to enter their business premises.

[2] During these public hearings, numerous persons spoke in favor of regulating off-premises canvassing activity and testified concerning the problems and complaints they had experienced or observed concerning the activity, including the lack of pedestrian privacy, sidewalk congestion, lack of access to some businesses, litter, and the need to preserve the atmosphere and appearance of Key West's Historic District.

advertising materials, and solicitation of customers.[3] Specifically, the OPC Ordinance affects only certain public areas and restricts the physical location of the barkers on a few heavily trafficked streets in the Historic District. Barkers who have obtained an appropriate permit are free to hawk their wares within these parameters. Moreover, a myriad of other forms of advertising remain available.

Key West's goals in enacting the OPC Ordinance, also omitted by Petitioner, are critical to the legal analysis. In adopting the OPC Ordinance, the City sought (1) to maintain a minimum level of pedestrian privacy for the persons who use the streets, sidewalks, and other public right-of-ways; (2) to reduce congestion of sidewalks and other public right-of-ways within the Historic District and to prevent canvassers and their prospective customers from gathering in such numbers as to block the entrances to businesses along the public right-of-ways; (3) to decrease litter by reducing the amount of often unwanted handbills; and (4) to maintain and improve the

---

[3] In pertinent part, the OPC Ordinance:

(a) establishes a permitting system for persons who seek to use government owned streets, sidewalks, and right-of-ways to engage in off-premises canvassing activity;

(b) prohibits off-premises canvassing activity in publicly owned parking lots, beaches, and Mallory Dock; and

(c) imposes limitations on off-premises canvassing activity within the City's Historic District along Duval Street, Front Street, Clinton Square, and portions of Whitehead and Simonton Streets.

visual appearance and atmosphere of Key West's Historic District.

While not mentioned by Petitioner, following the adoption of the OPC Ordinance, most restaurants, time share resorts, and other businesses came into compliance with the Ordinance. As a result of this compliance, the City received fewer complaints from pedestrians and business owners arising from unwanted confrontations and sidewalk congestion. Additionally, the City observed a reduction in the amount of litter generated by the distribution of printed advertising materials.

Petitioner also fails to mention that from approximately October 1, 1990 through the present, barkers acting on his behalf have engaged in off-premises canvassing within Key West's Historic District to promote Petitioner's restaurant. In addition to using off-premises canvassing, since opening his restaurant, Petitioner has advertised in the *Southern Bell Yellow Pages, Key West Citizen, Timeout Magazine, The Best of Key West Magazine,* and *Solaris Hill Newspaper.* Petitioner also has distributed promotional menus and other printed handbills to promote his business. All of these avenues of expression remain open and unfettered.

Petitioner sued Key West, claiming that the OPC Ordinance violated the First Amendment and Florida Statute § 166.0443. At trial, Key West presented numerous witnesses who testified that the OPC Ordinance directly and materially advanced the legitimate interests of the City. The trial court entered judgment in favor of Key West and against Petitioner, finding the OPC Ordinance to be constitutional under *Central Hudson Gas & Electric Corp. v. Public Service Comm'n.*, 447 U.S. 557 (1980). On

appeal, the Eleventh Circuit agreed and affirmed the judgment of the District Court.

Petitioner now seeks review in this Court, claiming conflict and other grounds.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied because the decision rendered by the United States Court of Appeals for the Eleventh Circuit does not conflict with the applicable decisions of this Court or the decision of another United States Court of Appeals on the same issues and because there are no other special and important reasons for this Court to review the above-entitled case. In affirming the District Court's judgment in favor of the City of Key West, the Eleventh Circuit correctly applied the well-settled law established by this Court regarding commercial speech regulations and rendered a decision which is completely consistent with the prior relevant decisions of this Court and those of other United States Courts of Appeals on the same issue.

The *Sciarrino* Case does not Conflict with *Hays County Guardian v. Supple*

The Eleventh Circuit's decision in *Sciarrino v. City of Key West*, 83 F.3d 364 (11th Cir. 1996), does not conflict with *Hays County Guardian v. Supple*, 969 F.2d 111 (5th Cir. 1992). Rather, the two cases involve two different types of speech to which the respective courts properly applied two different First Amendment standards.

In *Hays* the court considered a regulation affecting a newspaper which contained political commentary. Because such speech is afforded a high degree of First Amendment protection, the *Hays* court found that the regulation at issue could not withstand constitutional scrutiny.

In contrast, the Eleventh Circuit in *Sciarrino* considered a limited regulation on commercial speech. Because commercial speech occupies a lesser place in the hierarchy of First Amendment values, the Eleventh Circuit correctly applied the test established by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), and concluded that the regulation survived constitutional scrutiny.

Because the courts applied different tests to different types of speech to which different degrees of First Amendment protection are afforded, the Eleventh Circuit decision in *Sciarrino* and the Fifth Circuit's decision in *Hays* do not conflict and no basis for certiorari jurisdiction exists.

Lack of Conflict with Other Commercial Speech Cases

The Eleventh Circuit's decision does not conflict with any other Federal Court on the issue of commercial speech regulation. *Central Hudson* and its progeny require that the challenged regulation directly and materially advance at least one of the government's asserted interests. Here, both the District Court and the Eleventh Circuit held that the OPC Ordinance does materially and directly advance the City of Key West's legitimate interests. Both lower courts cited extensive records evidence supporting this conclusion.

Furthermore, it cannot be emphasized enough that the OPC Ordinance is *not* a total ban on advertising. For this reason, Petitioner's reliance on *44 Liquormart v. Rhode Island*, 116 S.Ct. 1495 (1996), must fail.

44 Liquormart involved an absolute prohibition on advertising the price of alcohol throughout the state of Rhode Island. In contrast, the OPC Ordinance merely regulates where barkers can conduct their activity within the Historic District. The Ordinance affects only a few of the most heavily trafficked streets, Mallory Dock, and the public beaches and parking lots, not an entire state, as in *44 Liquormart*.

Because there is no conflict between the Eleventh Circuit's opinion and the relevant decisions of this Court, the Petition for Writ of Certiorari should be denied.

Proper Application of Central Hudson

Despite Petitioner's argument to the contrary, *Central Hudson* remains the standard by which commercial speech regulations are analyzed, a point most recently confirmed by this Court's decision in *44 Liquormart*. Petitioner's suggestion that *Central Hudson* be abandoned offends the concept of stare decisis, as well as the clear import of the Court's decision in *44 Liquormart*.

In *44 Liquormart* the Court had occasion to and did consider whether commercial speech should be afforded the same First Amendment protection as political speech. In applying *Central Hudson*, a majority of the Court acknowledged that commercial speech is properly analyzed under *Central Hudson* and rejected the more

rigorous inquiry used in political speech cases. Thus, there is no "open issue" of law to be decided by this Court.

Because the Eleventh Circuit did not decide any important question of federal law which has not already been addressed and settled by this Court, the Petition for Writ of Certiorari should be denied.

ARGUMENT

A. THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *HAYS COUNTY GUARDIAN V. SUPPLE*, 969 F.2D 111 (5TH CIR. 1992)

The decision of the Eleventh Circuit does not conflict with any other circuit court decision. Specifically, Petitioner's suggestion that the Eleventh Circuit's decision conflicts with *Hays County Guardian v. Supple*, 969 F.2d 111 (5th Cir. 1992), is wholly unfounded.

Several critical distinctions, both factual and legal, preclude any conflict between the Eleventh Court's decision and *Hays*. Principally among these is the nature of the speech being regulated. In *Hays*, a university sought to regulate the distribution of a free newspaper which contained "political commentary." *Id.* at 118 (citations omitted). The *Hays* court noted that such speech was a "medium of communication . . . traditionally afforded great protection under the First Amendment." *Id.* (citations omitted). Because *Hays* did not involve commercial speech, a point which the Fifth Circuit emphasized in its analysis, the court did not apply the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service*

Comm'n, 447 U.S. 557 (1980), but rather a more stringent First Amendment analysis. *Id.* at 120.

In contrast, the instant case involves commercial speech, which, as this Court has recognized, occupies "a subordinate position in the hierarchy of First Amendment values." *Id.* at 120. (citing *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 477-78 (1989)). Because this case involves only commercial speech, the District Court and the Eleventh Court both properly applied the four prong test set forth in *Central Hudson*. *Sciarrino v. City of Key West, Florida*, 83 F.3d 364, 367 (1996); *Sciarrino v. City of Key West*, 867 F. Supp. 1017, 1020 (S.D. Fla. 1994).

This case involves the limited regulation of what can only be described as "human signs." The City is not banning all communication. Rather, the OPC Ordinance merely requires that "barkers," who are virtually walking, talking, human billboards, conduct their advertising activity in certain areas. The City can regulate such advertising when it is accomplished through a billboard or movable signage. *See, e.g., Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Supersign of Boca Raton, Inc. v. City of Fort Lauderdale*, 766 F.2d 1528 (11th Cir. 1985). For this same reason, the City is free to regulate such activity when it appears in the form of a barker.

Because the cases involve different types of speech to which the courts applied different tests, the Eleventh Circuit's decision in *Sciarrino v. City of Key West*, 83 F.3d 364 (1996) and *Hays County Guardian v. Supple*, 960 F.2d 111 (5th Cir. 1992), are not in conflict. For this reason, the Petition for Writ of Certiorari should be denied.

B. THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH RELEVANT DECISIONS OF THE UNITED STATES SUPREME COURT

The purported conflict between the Eleventh Circuit's decision and decisions of this Court suggested by Petitioner, Petition at 6, is simply non-existent. The District Court and the Eleventh Circuit both applied the standards for commercial speech cases established by this Court in *Central Hudson* and its progeny. Specifically, the lower courts expressly found that the OPC Ordinance directly and materially advance the City's legitimate interests. *Sciarrino,* 83 F.3d at 369.

The Eleventh Circuit critically examined the City's asserted interests and concluded that at least two of these interests were directly advanced to a material degree.[4] *Id.* at 369-70. The Eleventh Circuit began its analysis of this, the fourth, prong of *Central Hudson* by quoting the relevant portion of *Edenfield v. Fane,* 507 U.S. 761 (1993): "[a] party seeking to justify [a] commercial speech restriction must prove that 'the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' " *Id.* at 368. Additionally, the Eleventh Circuit went so far as to identify ***how*** a governmental entity can satisfy its

---

[4] Although the Eleventh Circuit did not find that the reduction in litter was appreciable, it found that the statute nonetheless survived constitutional scrutiny because the direct advancement of even one substantial interest is sufficient. *Sciarrino,* 83 F.3d at 369 (citing *Florida Bar v. Went For It, Inc.,* 115 S.Ct. 2371, 2376 n. 1 (1995)).

burden of showing that the regulation directly and materially advances its interests, citing studies, anecdotal evidence, testimony and photographs. *Id.*

The Eleventh Circuit concluded that, based upon its independent review of the factual record,[5] the OPC Ordinance satisfied the *Edenfield* standard. *Id.* at 369. In so concluding, the court enumerated the "extensive anecdotal evidence" demonstrating that the OPC Ordinance materially advanced the City's interests. *Id.* One, the court cited testimony regarding a "marked improvement" in pedestrian traffic. *Id.* at 369, n. 5. Two, the court found persuasive testimony that the number of complaints about harassment related to off premises canvassing "dropped off sharply" and "were substantially reduced if not eliminated." *Id.* Three, the court inferred that this testimony supported the conclusion that pedestrian congestion was "reduced considerably." *Id.* at 369, n. 6.

Petitioner's reliance on *44 Liquormart v. Rhode Island*, 116 S.Ct. 1495 (1996), fails because of the faulty premises upon which it rests. First, *44 Liquormart* does not represent the "evolution" in First Amendment jurisprudence that Petitioner asserts. Petition at 8-9. Rather, because the case involved purely commercial speech, the principal opinion in *44 Liquormart* applied, and thereby endorsed,

---

[5] Petitioner's attempt to have this Court reevaluate the factual findings of the District Court and the Eleventh Circuit is improper, as Petitioner never has challenged these findings to be clearly erroneous. *See, Pullman-Standard v. Swint*, 456 U.S. 273 (1982) (findings of fact will not be set aside unless clearly erroneous). Besides being improper, Petitioner's untimely challenge to the factual record does not establish a conflict which would provide grounds for certiorari jurisdiction.

the *Central Hudson* analysis. *44 Liquormart*, 116 S.Ct. at 1506.

Petitioner further compounds this error with the misstatement that *44 Liquormart* and the instant case are "remarkably similar." Petition at 11. The instant case involves limited restriction on off-premises canvassing. It only regulates a few public areas and the most heavily trafficked streets in the Historic District. All other avenues of communication remain open and unfettered.

In contrast, the statute in *44 Liquormart* "constitute[d] a ***blanket prohibition*** against truthful, non-misleading advertising about a lawful product." *Id.* at 1508 (emphasis added). The "drastic nature of [the State's] chosen means" – an absolute ban – led the *44 Liquormart* Court to conclude that "there is far less reason to depart from the rigorous review that the First Amendment generally demands." *Id.* at 1509, 1507.

Thus, because the OPC Ordinance does not totally ban truthful, nonmisleading advertising, those concerns which led the *44 Liquormart* Court to consider a more stringent First Amendment standard do not arise here.[6]

---

[6] Additionally, the *44 Liquormart* Court concluded that, even assuming that the State's asserted interest in promoting temperance was legitimate, there was no evidentiary support that the advertising ban would significantly advance that interest. *44 Liquormart*, 116 S.Ct. at 1509. Conversely, in the instant case, the Eleventh Circuit found the evidentiary record to be replete with evidence demonstrating that the OPC Ordinance significantly advanced the City's interests. *Sciarrino*, 83 F.3d at 369.

Additionally, Petitioner places unjustified reliance upon dicta in the concurring opinions of *44 Liquormart*. First, dicta, especially in a concurring opinion, does not constitute binding precedent. *See, Kastigar v. United States*, 406 U.S. 441, 454-55 (1972) (language not necessary to court's decision cannot be considered binding precedent). Second, the concurrences in *44 Liquormart* actually support the application of *Central Hudson* in the instant case. In his concurrence, Justice Scalia expressly declines to "declare *Central Hudson* wrong." *Id.* at 1517. Likewise, Justice O'Connor's opinion concurring with the judgment, in which Chief Justice Rhenquist, Justice Souter, and Justice Breyer joined, also applies the *Central Hudson* test. *Id.* at 1520, 1521. Finally, concurring in the judgment and Parts I, II, VI and VII of the principal opinion, Justice Thomas recommends that commercial speech be afforded a greater degree of constitutional protection where ***"the asserted interest is one that is to be achieved through keeping would-be recipients of the speech in the dark."*** *Id.* at 518 (emphasis added). Justice Thomas particularized this stricter test to the specific context of a total ban. *Id.*

Based upon the jurisprudence applied by the principal opinion and the concurrences in *44 Liquormart*, this Court continues to adhere to the *Central Hudson* analysis in commercial speech cases. Even taking into consideration the reservations of Justice Thomas, *Central Hudson* still would be applicable in the instant case, as this case involves only the limited regulation of barkers within the Historic District, not a total ban or an attempt to "keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace." *Id.* at 1515-16.

Finally, Petitioner's contention that the Eleventh Circuit's jurisprudence is somehow contrary to the "direction and language" of this Court likewise must be rejected. Petition at 9-10. While Petitioner maintains that the OPC Ordinance is a "de facto total ban," Petition at 10, this is not borne out by the record. The basis for the stricter standard by Justice Thomas in 44 *Liquormart* is the disfavor toward total bans on communication, which clearly is not the case here. *Sciarrino*, 83 F.3d at 366. Pursuant to the express language of the OPC Ordinance, Petitioner still may use barkers in the Historic District, as long as they obtain a permit and conduct their activity, for the busiest streets, in the designated locations. Thus, because the premise for a stricter standard – a total ban – is not present in the instant case, all of Petitioner's entreaties in favor of such a standard must fail.

Because there is no conflict between the Eleventh Circuit's opinion and the relevant decisions of this Court, the Petition for Writ of Certiorari should be denied.

C. THE ELEVENTH CIRCUIT APPLIED THE WELL-SETTLED LAW OF THIS COURT REGARDING COMMERCIAL SPEECH CASES

Up to and including its most recent opportunity to speak on the subject, this Court consistently has applied *Central Hudson* in commercial speech cases. *See e.g.*, 44 *Liquormart, supra*. Essentially, Petitioner is seeking to overturn *Central Hudson* and its progeny. As Justice Scalia asserted earlier this year, precedent provides no basis for declaring *Central Hudson* wrong or even the wherewithal to say what ought to replace it. *Id.* at 1515. In accordance

with the controlling precedent, commercial speech cases should be resolved based upon the existing jurisprudence. *See id.*

The City submits that, contrary to Petitioner's suggestion, this Court already has resolved the issue of whether commercial speech should be treated the same as political speech. Most recently, in *44 Liquormart*, the Court addressed the proper standard to be applied in commercial speech cases. The principal opinion, in which a majority of the Court concurred, conclusively demonstrates that *Central Hudson* is the appropriate test in commercial speech cases. This is especially true where, as here, the regulation does not constitute a total ban on truthful, nonmisleading communication. *See id.* at 1509, 1519. While some Members of the Court considered a different First Amendment analysis, a majority of the Court rejected those alternatives in favor of *Central Hudson*.

Thus, the issue which Petitioner claims to be open was in fact considered and resolved by the *44 Liquormart* Court. *Central Hudson* remains the controlling test in commercial speech cases. Accordingly, Petitioner's question has been answered, albeit, not in the manner in which he wishes.

Because the Eleventh Circuit did not decide any important question of federal law which has not already been addressed and settled by this Court, the Petition for Writ of Certiorari should be denied.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

MICHAEL T. BURKE
CHRISTINE M. DUIGNAN
Counsel of Record

JOHNSON, ANSELMO, MURDOCH,
BURKE & GEORGE, P.A.
790 East Broward Boulevard
Suite 400
Fort Lauderdale, Florida 33301
(954) 463-0100

Attorneys for Respondent